UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF	)	
	)	
Prestige Chemical Company Site	)	CERCLA Lien Proceeding
Senoia, Coweta County, Georgia	)	
	)	

RECOMMENDED DECISION

This matter was heard by the Regional Judicial Officer for the United States Environmental Protection Agency (EPA), Region 4, to determine whether EPA has a reasonable basis to perfect a lien, pursuant to Section 107(*l*) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607(*l*), on property known as the Prestige Chemical Company Site, located in Senoia, Coweta County, Georgia. An informal hearing was conducted pursuant to the Supplemental Guidance on Federal Superfund Liens, dated July 29, 1993 (OSWER Directive Number 9832.12-1a), after which additional Memoranda of Law and exhibits were submitted into the Lien Filing Record (LFR).

CERCLA Lien Provisions

Section 107(*l*) of CERCLA provides that all costs and damages for which a person is liable to the United States in a cost recovery action shall constitute a lien in favor of the United States upon all real property and rights to such property which 1) belong to such person and 2) are subject to or affected by a removal or remedial action.

Under the Supplemental Guidance, as the neutral designated to conduct this proceeding and to make a written recommendation, I am to consider all facts relating to whether EPA has a reasonable basis to believe that the statutory elements for perfecting a lien under Section 107(*l*)

of CERCLA have been satisfied. Specific factors for my consideration under the Supplemental Guidance include:

> Element 1: Whether the property was subject to or affected by a removal or remedial action.
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> Element 2: Whether the United States has incurred costs with respect to a response action under CERCLA.
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> Element 3: Whether the property is owned by a person who is potentially liable under CERCLA.
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> Element 4: Whether the property owner was sent notice by certified mail of potential liability.
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> Element 5: Whether the record contains any other information which is sufficient to show that the lien should not be filed.

Factual Background

The property at issue in this proceeding consists of 6.25 acres of land known as the Prestige Chemical Company Superfund Site ("Site"). There are five structures on the Site. Paul R. McKnight, Jr., (McKnight) alleged by EPA to own the entire Site, leased the front-half of a warehouse to Deryl Parker, owner and operator of Prestige Chemical Company, to use for storage. The written lease covered the period from January 1, 1996 to December 31, 1996. The LFR contains a copy of a letter dated September12, 1997, from Mr. McKnight to Mr. Parker, ordering him to vacate for nonpayment of rent. (See EPA Exhibit 3[1])

During the operations at the Site, Mr. Parker collected drums of flammable paint wastes from the Atlanta area auto paint and body shops and, using his own truck, transported and then

[1]For purposes of this decision, certain documents contained in the LFR will be referenced as either EPA Exhibits or McKnight Exhibits, as they were submitted as attachments to the parties' respective Memoranda of Law.

stored them in warehouse #4 on the Site.

As a result of receiving an anonymous tip on September 4, 1997, the Georgia Environmental Protection Division investigated the Site and then requested assistance from EPA's Emergency Response/Removal branch, which conducted a Site assessment. The EPA emergency personnel reported seeing precariously stacked and leaking drums in the warehouse, as well as pools of product and the strong smell of solvent. The On Scene Coordinator concluded there were releases and a substantial threat of release of hazardous substances at the Site. (EPA Ex. 4) The fund-lead removal began on October 22, 1997.

Disputed Matters

Prior to examining each of the above factors for review, it is essential to examine the threshold issue raised by Mr. McKnight, that the Site consists of two separate parcels, only one of which is 1) owned by McKnight, and 2) upon which any removal activity occurred. Should I determine that the site consists of two such distinct parcels, each essential element for a lien determination would then be applied to each of those parcels separately.

In essence, Mr. McKnight argues that the notice letter itself described two different parcels: a) the "warehouse property" upon which Deryl Parker conducted business and upon which the government initiated the removal actions leading to this superfund lien proceeding, and

b) the "hay barn property" an adjacent property upon which Mr. McKnight's son operates a hay business. He contends that no business was conducted by Mr. Parker on this property and that the removal action did not involve this property. As additional support for his position, McKnight contends that a ditch runs between the properties and that during removal activity, the

"warehouse property" was separated by a fence. While Mr. McKnight opposes the filing of a Notice of Lien on either property, he raises certain distinct legal arguments concerning the Hay Barn property that must be addressed first.

A substantial portion of the informal hearing and post-hearing submissions, address the chain of title with respect to the property. Conflicting conclusions are drawn by the parties as to current title.

Relying upon EPA's title documents, McKnight claims the Hay Barn Property and the Warehouse Property have passed through separate chains of title and that the chain of title with respect to the Warehouse Property indicates that its title is vested jointly in Paul R. McKnight, Jr. and the estate of his father, Paul R. Mcknight, Sr. Similarly, he claims, that the chain of title with respect to the Hay Barn Property reflects that title to this property is vested in P.R. McKnight and Sons, a partnership. However, EPA views the property as having merged into one parcel by virtue of the will of Paul McKnight Jr.'s mother, Kathleen McKnight, and that any remaining interests he did not own in both parcels he received at one time through his mother's will in 1989. McKnight refutes the EPA position, by asserting that there is no evidence that he ever assented to the devises under either Mr. and/or Mrs. McKnight's wills, which are the bases upon which EPA's position rests. Therefore, McKnight concludes that all he owns is one-half interest in the Warehouse Property.

The government admits that while it is unclear what happened to the title to the Hay Barn Property held by the P.R. McKnight Partnership at the time of death of Mr. McKnight, Sr., any interest McKnight Sr. held at that time was devised to his wife. I find the conclusion reached by EPA to be valid. While there is indeed no evidence that Paul McKnight, Jr. assented in writing,

his assent can be presumed from his conduct, when he was both the executor and legacy. OCGA §53-8-15(b). This conduct, as EPA points out, includes: possession since 1989; holding himself out as owner for purposes of entering into the lease with Parker; listing as the owner in the Coweta County Property Records; and paying taxes on the property. Lastly, and perhaps most telling, is that Mr. McKnight considers himself the property owner, as reflected in his response to that very question posed to him at the outset of the lien hearing. (TR 5, 23-24).

For purposes of this proceeding, based upon the aforementioned facts supported by the lien filing record, I find that Respondent owns the portion of property referred to as the Warehouse Property as well as the Hay Barn Property.

However, the finding that Mr. McKnight, Jr. owns all of the disputed property does not resolve the issue of whether the property consists of two distinct parcels upon which the lien filing notice should apply. I find that the Notice of Intent Letter in this matter speaks for itself. The Site description contained two separate parcel descriptions. I am not convinced that the devise of these two separate parcels, in and of itself, merged them into one. On the other hand, what is also somewhat persuasive is that fact that the Coweta County property records do list this as one, with a *combined* value of greater than $93,000, and *total* acreage of 6.25. Therefore, examining one of the primary purposes of the statutory lien provisions, preventing the property owner from realizing a windfall from fund cleanup and restoration activities due to the enhanced value of the entire parcel, it would appear that that purpose may best be served if the parcels should be viewed as one.

Unfortunately, the tools generally used to make such determinations lead to rather conflicting conclusions when applied to the matter at hand. On the one hand, the tax records

treat this as one parcel, while deeds, devises and the lien filing notice itself, distinguish the parcels. Therefore, to help resolve this issue, I will look to the extent of contamination and removal activity as additional bases upon which to determine whether the warehouse property and hay barn property, should be treated as two distinct parcels as opposed to one. See U.S. v Township of Brighton, Michigan, 153 F. 3d 307; U.S. v. 150 Acres of Land, 204 F 3d 698 (6th Cir. 2000)

Unequivocally, EPA "does not claim that any releases of hazardous substances occurred on the part of the Site originally identified as the "Rowe" [*hay barn]* property..." Agency's Reply Memorandum, p. 7. However, EPA is adamant that both portions were more importantly the subject of, a "removal", consisting of the cleanup or removal of released hazardous substances from the environment...." or "taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to public health or welfare or to the environment, which may otherwise result from a release or threat of release". The actions that EPA sets forth as amounting to this "removal" consisted of locating the Command Center where all field removal activites were planned, coordinated, and monitored. It is helpful to look to other Probable Cause Determinations that considered this issue.

In the case, In the Matter of Bohaty Drum Site, CERCLA Lien Recommended Decision (EPA 5 RJO Kossek, June 22, 1995), the Regional Judicial Officer, found that all three parcels at issue were subject to or affected by a removal action based upon the fact that investigatory activities were conducted on each parcel, notwithstanding the fact that drums were physically removed from only one Parcel. Citing Kelly v. E.I. DuPont De Nemours and Co., 17 F. 3d 836 (6th Cir. 1994), the RJO relied upon the proposition that investigatory activity was included in the

definition of "removal" as "such actions as may be necessary to...assess, and evaluate the release or threat of release." The policy aimed toward prevention of unjust enrichment and prevention of owner windfalls from cleanup, found in the congressional record, were found to be paramount in these cases. Reaching the opposite conclusion in the case, In the Matter of Pacific States Steel,

CERCLA Lien Recommended Decision, (EPA 9 RJO Anderson, 1995), the RJO disagreed with the Government's contention that while removal activity was limited to one of three parcels the other parcels were all "affected by" and benefitted by the removal. Removal personnel had simply driven through the other parcels in order to reach the one on which the physical removal activity took place. A primary distinction appears to be the extent to which any investigative activity took place on the parcel from which drums were not actually removed.

In the case at hand, drums were only removed from the warehouse property. However, the most compelling argument is that the Command Center was located on the part of the Site that McKnight contends was not subject to removal activity. While EPA concedes there was no release at that portion of the site, activity was taken to address the threat of release, summarized as follows:

> "... EPA's Emergency Command Center was located on the part of the site formerly known as the Rowe property... Ths Command Center was the Agency's operation headquarters for removal, where all field removal activities were planned, coordinated, and monitored. Samples of all the contents of the drums were processed and the results were assessed in the Emergency Command Center. The OSC and his staff conducted the daily logistical work, evaluating all information received, directing all acivities, and making he decisions related tot he removal in the Emergency Command Center..." (*See* Agency's Reply Memorandum, p.7)

I am persuaded by EPA, that these investigatory activities were the type of removal

activity contemplated by the Act. Therefore, I reach an affirmative conclusion with respect to element 1 above, the total property was subject to or affected by a removal or remedial action. Having also found that the two parcels making up the property as described in the Lien Notice are both owned by Paul McKnight, Jr., I will now proceed to the other four other elements for consideration.

Whether the property owner was sent notice by certified mail of potential liability:

This is one of two elements that are not in dispute in this matter. On March 7, 2001, Region 4 sent a general notice letter to Mr. Paul R. McKnight, Jr., informing him that he was potentially liable for the costs incurred in conducting a response on his property and that EPA intended to perfect a lien on the property, pursuant to Sections 107(a) and 107(l)of CERCLA, 42 U.S.C. § 9607(a) and (*l*). This was sent Certified Mail, Return Receipt Requested, and received on March 9, 2001, as indicated on the copy of the return receipt made part of the Lien Filing Record.

Whether the United States has incurred costs with respect to a response action under CERCLA:

This, the second element not in dispute, has been established. EPA has incurred costs of $1,414,694.19, as of June 14, 2001. (EPA Ex. 15).

Whether the property is owned by a person who is potentially liable under CERCLA:

Although I have reached the conclusion that title to the property in question is owned by Paul McKnight, Jr., this does not resolve whether he is potentially liable under CERCLA. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), states in pertinent part:

> "Notwithstanding any other provision or rule of law, and subject to the defenses set forth in subsection (b) of this section.

> (1) the owner...,of a ...facility...shall be liable for ...
> (A) all costs of removal or remedial action incurred by the United States Government...not inconsistent with the national continency plan..."

However, Mr. McKnight, Jr. has raised, as a defense to this liability, what is referred to as the "innocent landowner defense" to liability under CERCLA, found at 107(b)(3) of CERCLA. That section, provides in pertinent part, that,

> "There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by...(3) an act or omission of a third-party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant...if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions..."

Thus, this defense absolves from liability a current owner who can demonstrate that the release of hazardous substances was caused by a third party with no contractual relationship to the current owner and that the current owner exercised due care.

As will be discussed, I find that while the release of hazardous substances was indeed caused by a third party, the other two prongs of the innocent landowner defense are absent in this case. Looking at the second essential element, that there not be a direct or indirect contractual relationship between the third party who caused the release, Mr. Deryl Parker, and the current owner, Mr. Paul McKnight, Jr., the defense fails.

It is uncontroverted that Mr. Deryl Parker was the sole cause of the release in this case.[2] As evidenced by the LFR, Mr. McKnight and Mr. Parker entered into a contractual relationship in the form of a lease, the terms of which provided for Parker to lease the front half of warehouse #4, for storage for twelve months, from January 1, 1996 until December 31, 1996. McKnight argues that since the written lease expired on Dec. 31, 1996, and EPA did not discover the "release" until first visiting the site on in September, 1997, there was no contractual relationship during the requisite period of time. Furthermore, McKnight contends that if Mr. Parker continued to conduct acts at the warehouse after that date, he did so as a trespasser. Interestingly, Mr. McKnight also raises the argument that the warehouse was leased for storage, which was neither a disposal nor a release, and therefore, not the contractual relationship that would defeat his innocent landowner defense. Ultimately, McKnight contends, that there was no evidence of a release, but only storage, so that any release claimed to have occurred might very well have taken place after the expiration of the lease.

To determine whether Mr. McKnight has met the burden of establishing that he is an innocent landowner, I will address each element separately:

1. Was another party the sole cause of the release or threat of release?

As discussed above, Deryl Parker was the sole cause of the release in this case. Contrary to Mr. McKnight's contention, the government has established that there was a threat of a release, found to have existed by evidence of flammable and leaking drums. This threat is tantamount to a release as defined in CERCLA. State of New York v. Shore Reality Corp., 759

[2] Deryl Parker was indicted in Coweta County Superior Court for unlawful transportation, storage and disposal of hazardous waste and sentenced to three years in prison. McKnight Ex J

F. 2d 1032, 1045 (2nd Cir. 1985).

2. Whether Deryl Parker's act did not take place in connection with a contractual relationship with McKnight.

The term "contractual relationship" for purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds of other instruments transferring title or possession,..." Attached as EPA Exhibit 2, is the lease between Daryl Parker and Paul McKnight, Jr. Case law has established that leases are one type of contractual relationship contemplated by section 9607(b)(3) of CERCLA U.S. v. A & N Cleaners and Launderers, Inc., 788 F. Supp 1317 (S.D. N.Y. 1992). Furthermore, leases for storage, as precisely called for here, have been found to be such contracts. U.S. v. Monsanto Co., 858 F. 2d 160 (4th Cir. 1988). Mr. McKnight would have this tribunal believe that for a contractual relationship to have existed that would defeat the innocent landowner defense, it needed to have been for the purpose of the disposal or release of hazardous waste, rather than mere undefined storage. While some courts have required a somewhat tighter nexus between the contract and the environmental damage resulting, the contractual relationship for storage of chemicals in the warehouse is sufficient to defeat the innocent landowner defense.

McKnight's alternative theory, that even if he had a contractual relationship, such relationship ended when the written lease expired on December 31, 1996 fails as well. First, there is nothing to establish that the drums that caused the threat of release only became threatening after December 31, 1996. Furthermore, Mr. McKnight did not "evict" Deryl Parker until September 20, 1997, when he wrote a letter demanding that Mr. Parker remove all contents

of the warehouse by the 20th of that month. As established by EPA, notwithstanding the expiration of the term of the written lease, Mr. Parker's status was not one of trespasser after the expiration of the lease.

Although failure to prove even one of the four elements of a Section 107(b)(3) claim would defeat the innocent landowner defense, McKnight has also failed to defeat the last two, that he exercised due care and that he guarded against foreseeable acts of third parties. While "[t]he statute does not sanction ... willful or negligent blindness on the part of absentee owners...", it certainly does not sanction such passivity on the part of an owner who is on-site on a routine and regular basis. Id. at 169. Certainly McKnight could have easily made a visual site inspection of the warehouse that he owned, and leased. Even assuming that Parker was conducting the janitorial business he purported to conduct, it would have been reasonable for Mr. McKnight, as the warehouse owner, to have occassionally made inquiry about the use of his property. Were not cleaning supplies the kinds of chemicals that should have alerted Mr. McKnight to the need to exercise due diligence as well?

I find that while McKnight has proven that a third party was the sole cause of the release, or threat of release in this case, he has not proven by a preponderance of the evidence that these acts of the third party did not occur in connection with a contractual relationship. Furthermore, had McKnight established that there was no contractual relationship, he did not prove by a preponderance of the evidence that he exercised due care and took precautions against foreseeable acts and omissions of third parties.

Conclusion:

EPA has made the prima facie showing necessary to impose a CERCLA lien on the

Prestige Chemical Company Site. McKnight has failed to prove three of the four elements which are all independently necessary to prove in order to prevail on the CERCLA section 107(b)(3) third party/innocent landowner defense. Therefore, I find that EPA has a reasonable basis to perfect its lien. **Probable cause exists for EPA to file the proposed notice of Federal Lien**.

This Determination does not bar EPA or the property owner, Paul McKnight, Jr. from raising any claims or defenses in later proceedings. This is not a binding determination of liability. This recommended decision has no preclusive effect, nor shall it be given deference or otherwise constitute evidence in any subsequent proceeding.

Dated: March 26, 2002

SUSAN B. SCHUB
Regional Judicial Officer